

process, it may submit a written petition requesting that the dismissal be without prejudice. Such petition must demonstrate good cause, comply with § 90.162 of this part, and be served upon all parties of record. The Commission may grant such petition and dismiss the application without prejudice or deny the petition and dismiss the application with prejudice.

(2) If the application is untimely filed; The Commission may dismiss without prejudice any application that is prematurely or filed late, including any application filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.

(3) If the application is mutually exclusive with another application that is selected or granted in accordance with the rules in this part; The Commission may dismiss any mutually exclusive application:

(i) For which the applicant did not submit the winning bid in a competitive bidding process;

(ii) That is included in a random selection process but is not granted; or

(iii) That receives comparative consideration in a hearing but is not granted by order of the presiding officer.

(4) For failure to prosecute; The Commission may dismiss applications for failure of the applicant to prosecute or for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing or prior to selection of the application in a random selection process, but may be with prejudice in cases of non-compliance with § 90.162. Dismissal will generally be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing or after selection of the application in a random selection process. The Commission may dismiss applications with prejudice for failure of the applicant to comply with requirements related to a competitive bidding process.

(5) If the requested spectrum is not available; The Commission may dismiss any application that requests spectrum which is unavailable because:

(i) It was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing interference; or

(ii) Reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(6) If the application is found to be defective. Such dismissal may be "without prejudice," meaning that the Commission may accept from the applicant another application for the same purpose at any later time, or "with prejudice," meaning that the Commission will not accept from the applicant another application for the same purpose for a period of one year following the date of the dismissal action taken by the Commission. Unless otherwise provided in this part, a dismissed application will not be returned to the applicant. The Commission may dismiss without prejudice applications that it finds to be defective. An application for authorization or assignment of authorization is defective if:

(i) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character; or

(ii) It requests an authorization that would not comply with the Commission's Rules and does not contain a request for waiver of these rule(s), or in the event that the Commission denies such a waiver request, does not contain an alternative proposal that fully complies with the rules.

**§ 90.162 Agreements to dismiss applications, amendments, or pleadings.**

(a) Parties that have filed an application concerning facilities used to provide commercial mobile radio services that is mutually exclusive with one or more other applications, and then enter into an agreement to resolve the mutual exclusivity by withdrawing or requesting dismissal of the application or an amendment thereto, must obtain

the approval of the Commission. Parties that have filed or threatened to file a petition to deny, informal objection, or other pleading against a pending application, and then seek to withdraw or request dismissal of, or refrain from filing, the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the Commission.

(b) The party withdrawing or requesting dismissal of its application, petition to deny, informal objection, or other pleading, or refraining from filing a pleading, must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit setting forth:

(1) A certification that neither the party nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses incurred in preparing and prosecuting the application, petition to deny, informal objection, or other pleading in exchange for the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading, or threat to file a pleading, except that this provision does not apply to dismissal or withdrawal of applications pursuant to bona fide merger agreements;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading or threat to file a pleading.

(c) In addition, within five (5) days of the filing date of the applicant's or petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for withdrawing or dismissing the ap-

plication, petition to deny, informal objection, or other pleading; and

(2) The terms of any oral agreement relating to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading.

(d) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition against an application. For purposes of this section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector, incurred reasonably and directly in preparing to file a petition to deny, will not be considered to be payment for refraining from filing a petition to deny or an informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement non-financial promises are prohibited unless specifically approved by the Commission.

(e) For purposes of this section:

(1) Affidavits filed pursuant to this section must be executed by the filing party, if an individual, a partner having personal knowledge of the facts, if a partnership, or an officer having personal knowledge of the facts, if a corporation or association.

(2) Applications, petitions to deny, informal objections, and other pleadings are deemed to be pending before the Commission from the time the application or petition to deny is filed with the Commission until such time as an order of the Commission granting, denying, or dismissing the application, petition to deny, informal objection, or other pleading is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a party in preparing to file, filing, prosecuting and/or settling its application, petition to deny, informal objection, or other pleading for which reimbursement is sought.

(4) "Other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(f) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for an FCC authorization awarded through competitive bidding shall be subject to the restrictions set forth in section §1.2105(c) of this chapter.

[59 FR 59959, Nov. 21, 1994, as amended at 62 FR 11636, Mar. 12, 1997]

**§90.163 Petitions to deny, responsive pleadings.**

Petitions to deny any major filing concerning facilities used to provide commercial mobile radio services may be filed by parties able to demonstrate standing to file such petitions. Responsive pleadings to such petitions may be filed in accordance with the provisions of this section.

(a) *Content and requirements.* Petitions to deny and responsive pleadings must:

(1) Clearly identify the pertinent major filing(s);

(2) Comply with all applicable requirements of §§1.41 through 1.52 of this chapter;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, are supported by affidavit of a person or persons with personal knowledge thereof, and which are sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant or other Commission action regarding the major filing would be inconsistent with the public interest;

(4) Be filed within 30 days after the date of the Public Notice listing the major filing; and

(5) Contain a certificate of service showing that a copy has been mailed to the applicant no later than the date of filing with the Commission.

(b) *Expansion.* Petitions to deny a major amendment to an application may raise only matters directly related to the major amendment that could not have been raised in connection with the application as originally filed. This paragraph does not apply to petitioners who gain standing because of the major amendment.

(c) *Dismissal.* The Commission may, by letter, dismiss any petition to deny

a major filing if the petition does not comply with the requirements of this section or §90.161. The reason(s) for the dismissal must be stated in the letter. When a petition to deny is dismissed, any related responsive pleadings also are dismissed.

**§90.164 Classification of filings as major or minor.**

Applications and amendments to applications are classified as major or minor when such filings concern facilities used to provide commercial mobile radio services. Categories of major and minor filings are listed in section 309 of the Communications Act of 1934, as amended (47 U.S.C. 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. The following are major filings:

(a) *Initial station authorization.* Filings for an initial authorization as defined in §90.165(d)(2) are major.

(b) *Ownership or control change.* Filings are major if they specify a substantial change in beneficial ownership or control (de jure or de facto), unless such change is involuntary or if the filing merely amends an application to reflect a change in ownership or control that has already been approved by the Commission.

(c) *Renewal.* Applications for renewal of authorizations are major.

(d) *Environmental.* Filings are major if they request authorization for a facility that would have a significant environmental effect, as defined by §§1.1301 through 1.1319 of this chapter.

(e) In the Specialized Mobile Radio Service, in addition to filings listed in paragraphs (a) through (d) of this section, filings are major if they:

(1) Request a change in frequency;

(2) Request an authorization that would increase the effective radiated power or antenna height above average terrain in any azimuth from an existing transmitter authorized to the filer;

(3) Request an authorization that would relocate an existing fixed transmitter;

(4) Amend a pending application to change a requested frequency;

(5) Amend a pending application in a way that would increase the proposed effective radiated power or antenna